***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

ORIGINAL

# 75-2145

*To be argued by*
GERALD M. LABUSH

# United States Court of Appeals
**For the Second Circuit**

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UNITED STATES *ex rel.* AGNES SCRANTON,

*Petitioner-Appellant,*

*against*

THE STATE OF NEW YORK,

*Respondent-Appellee.*

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**On Appeal from the United States District Court for the Southern District of New York**

## BRIEF FOR RESPONDENT-APPELLEE


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## BRIEF FOR RESPONDENT-APPELLEE

### Preliminary Statement

Petitioner Agnes Scranton appeals from an order of the United States District Court for the Southern District of New York (OWEN, J.) entered November 10, 1975, which denied her petition for a writ of habeas corpus. On November 18, 1975, Judge Owen granted a certificate of probable cause for appeal to this Court.

In her petition below Scranton alleged that she had been denied a speedy trial and requested an order dismissing

her indictment. Judge Owen, rejecting her claims, dismissed the petition. He noted:

> Under state law, petitioner's speedy trial claim could be raised at trial and upon appeal. *See, e.g., Watts* v. *Supreme Court,* 28 N.Y. 2d 714 (1971). And at trial, the Court would be in a better position to determine whether the petitioner had been prejudiced by the delay.
>
> * * *
>
> Interests of comity demand that petitioner exhaust her state remedies. She may present her claim as an affirmative defense at trial, and upon appeal if convicted. (AA 31, 34).*

## Statement of Facts

On January 6, 1970, Agnes Scranton was indicted for the murder of her fifteen-month-old daughter, Patricia Polite. In March, 1970, Scranton was released on $10,000 bail. During the next four years there were more than fifty adjournments in Scranton's case and four defense motions to dismiss the indictment for lack of a speedy trial (A. 75).**

On February 13, 1974, as the date of trial finally neared, Scranton applied, before the Appellate Division, First Department, for a writ of prohibition (Article 78, N.Y.C.P. L.R.) to preclude her prosecution for the murder of her daughter on the ground that she had been denied her right to a speedy trial.

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* Numerical references preceded by "AA" refer to petitioner's appendix in this Court.

** Numerical references preceded by "A" refer to the pages of petitioner's appendix filed in the New York State Court of Appeals and with the court below.

**Scranton's Allegations Before the Appellate Division**

In support of the application for a writ of prohibition, several allegations were made by Eleanor Jackson Piel, one of petitioner's appointed counsel. Counsel alleged that Scranton had been indicted for murder four years previously; that she had made four motions to dismiss the indictment for failure to prosecute; and that the People had not answered that they were ready for trial until January 21, 1974.

Additionally, it was alleged that the prosecutor had withheld exculpatory evidence from the defendant: that one of Mrs. Scranton's children admitted striking the deceased child shortly before her death. According to counsel's allegation, she first had learned of this information from the prosecutor in the fall of 1973. She also claimed that she did not receive notification that the prosecution intended to introduce at trial admissions made by the defendant until January, 1974.

Additionally, counsel alleged that Mrs. Scranton was in poor health, suffering from sickle-cell anemia.

Finally, it was alleged that Scranton had been denied a speedy trial, and that there was nothing in the record to justify the delay (A 7-13).

**People's Response Before the Appellate Division**

The People submitted affidavits rebutting all of Scranton's major contentions. These affidavits alleged that the official New York County Supreme Court file for the Scranton case revealed various adjournments attributable to the

defense, but no adjournments or delays attributable to the prosecution. The People also alleged that Mrs. Piel had claimed that she had been unable to answer ready from November 9, 1971 through at least May 3, 1972.* Also, the People alleged that in an application dated June 19, 1973, Mrs. Piel requested a ten-day adjournment while she was in Chicago.

Disputing Scranton's claim that the prosecution had withheld exculpatory evidence, the People alleged that the defense counsel had, in fact, told the prosecutor in the fall of 1973 that she knew that the defendant's retarded child was said to have struck the deceased. The People further alleged that the defense counsel and the prosecutor (then Mr. O'Reilly) had discussed the defendant's statements a number of times long before the fall of 1973, although defense counsel had not been served with formal, written notice that the People intended to use the defendant's admissions at trial (A 27-36).

Finally, the People alleged that Mrs. Piel had frequently told the prosecutors that the defendant was a sick woman, whose sickle-cell anemia was so advanced that she could hardly walk and that due to this condition and defendant's shortened life expectancy the case should not be prosecuted (A 28-29).

On February 28, 1974, the Appellate Division denied defendant's application and dismissed her petition, without opinion (A 118-119).

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* This inability to answer ready (alleged in defendant's motion of May 3, 1972) was allegedly due to the fact that defendant's hospital records had not been given to counsel pursuant to a 1971 defense motion. That motion, however, had previously been denied in 1970 (A 29-30).

Over the objections of defense counsel, the case was moved to trial on March 4, 1974 and three jurors were sworn. The following day, the prosecutor, who was in her sixth month of pregnancy, was stricken with the flu and confined to bed (A 275). Mrs. Piel refused to consent to either a mistrial or an adjournment of the proceedings because, when she had a few days previously asked for an adjournment "the District Attorney opposed * * * [and] the Appellate Division denied the motion" (A 280-1). Nevertheless, the court granted an adjournment.

On March 11, 1974, due to Mrs. Snyder's continued inability to proceed to trial, the case was reassigned to Assistant District Attorney John Tully (A 293). The People moved for and received a mistrial so that Mr. Tully could prepare the case, a task which he estimated would take approximately two weeks because he was then commencing an unrelated homicide trial (A 294). At that time Scranton's bail was exonerated and she was released on her own recognizance, a condition that remains in effect now.

Scranton then brought a second Article 78 proceeding to bar her retrial on the grounds of double jeopardy and denial of a speedy trial. On April 11, 1974, the Appellate Division denied this motion. Subsequently, it was consolidated with the defendant's prior speedy trial claim in the New York Court of Appeals. The defendant has not pursued her double jeopardy claim in federal court.

Following the denial of her Article 78 proceeding in the Appellate Division, Scranton appealed, allegedly as of right, to the New York Court of Appeals. On February 27, 1975 that court affirmed the Appellate Division's dis-

missals of Scranton's applications. *Matter of Scranton* v. *Supreme Court of State of New York,* 36 N.Y. 2d 704 (1975). The court, which did not reach the merits of the speedy trial claim, held: "[a] claim of denial of a speedy trial is not cognizable in an application pursuant to CPLR article 78 for a judgment prohibiting a District Attorney and the Justices of the Supreme Court from proceeding on an indictment." *Id.* at 705.*

Following the Court of Appeals' decision, counsel for Scranton did not move to dismiss the indictment in state court. Rather, after the case was set for trial in March 1975, petitioner went to federal court where she obtained a stay, preventing the People from again moving this case to trial.**

In March, 1975, Scranton commenced a habeas corpus proceeding in the court below. On March 17, 1975, Judge Owen stayed the state court proceedings. On November 6, 1975, Judge Owen denied Scranton's habeas corpus application, finding that she had failed to exhaust her state remedies. On November 20, 1975, Judge Owen continued the stay of the state court proceedings. On appeal to this Court petitioner renews her claim that she is entitled to pretrial habeas corpus relief on her speedy trial claim.

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* The court rejected the double jeopardy claim on the merits, and petitioner does not contest that decision in this Court.

** As we noted in the court below the People were, and continue to be, ready to proceed to trial in this matter.

## POINT I

**Petitioner, who has failed to exhaust her state remedies, is not entitled to habeas corpus relief.**

Agnes Scranton claims that she has been denied her right to a speedy trial and asks that the indictment against her be dismissed. Scranton has not exhausted her state remedies on her speedy trial claim. Indeed, petitioner concedes that New York provides a state remedy for petitioner's claim. Appellant's Brief, at 12. Petitioner could move to dismiss the indictment, claiming that the People had denied her a speedy trial. Following the denial of her motion she could proceed to trial. If convicted, she could assert her claim on appeal. See *Watts* v. *Supreme Court,* 28 N.Y.2d 714 (1971). Or, instead of going to trial, Scranton could plead guilty and have her speedy trial claim reviewed on appeal. *People* v. *Blakley,* 34 N.Y. 2d 311 (1974). It is well settled that these remedies must be exhausted before federal habeas corpus is available. *Ex parte Royall,* 117 U.S. 241, 251 (1886).

*Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973), supports this conclusion. There, the Supreme Court held that the federal district court could entertain a habeas corpus petition where petitioner alleged that the state refused to grant him a speedy trial. The petitioner in *Braden* was asking only that the federal court order a speedy trial. He was not asserting a defense to the state charge. He was not asking that the indictment against him be dismissed. He was asking only that his case be tried promptly. Indeed, Braden's demand for a speedy

trial had been heard and rejected by the Kentucky courts, on the merits. In holding that *Braden* had satisfied the exhaustion requirement, the Court wrote:

> * * * He has already presented his federal constitutional claim of a present denial of a speedy trial to the courts of Kentucky. The state courts rejected the claim. * * * Petitioner exhausted all available state court opportunities to establish his position that the prior escape did not obviate the Commonwealth's duty * * *. Moreover, petitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court, not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum. *Braden, supra,* at 481.

Scranton, unlike Braden, has not asserted her constitutional rights to a speedy trial. Instead, she has sought to avoid a trial. Indeed, all of Scranton's appellate forays, both in the state and federal courts have been aimed not at enforcement of her right to a speedy trial, but, rather, to the avoidance of a trial altogether.

In *Braden* the Court made it clear that a federal court could not entertain a petition, on a speedy trial claim, from a defendant in a state criminal proceeding who, like Scranton, was asking the federal court to dismiss his state indictment before trial.

> We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court. *Braden, supra,* p. 493 [emphasis in original].

Although conceding that she is seeking to "interfere with" a state proceeding in this Court, Scranton maintains that she is entitled to relief because she has no adequate remedy short of going to trial and then proceeding through the state appellate process.

In effect what the petitioner is asking the Court to do here is analagous to the relief sought by petitioners in *Younger* v. *Harris*, 401 U.S. 37 (1971). She is, in effect, seeking federal injunctive relief to interrupt a pending state prosecution. The Court, in *Younger*, noted that since earliest times there has been a long-standing policy against federal court interference with state court proceedings. 401 U.S. at 43. For injunctive relief to be granted, the petitioner must show that 'the threat to [her] federally protected rights must be one that cannot be eliminated by [her] defense against a single criminal prosecution." *Id.* at 46.

Scranton claims that she is entitled to the extraordinary remedy of federal relief on the grounds that going to trial will subject her to irreparable damage. However, in *Younger*, the Court noted that the cost, anxiety and inconvenience of having to defend a criminal prosecution do not, by themselves, constitute "irreparable injury." 401 U.S. at 46.

This Court has recently reiterated the bases for nontervention in state proceedings:

> (1) The recognition, both congressional and judicial, that federal courts should permit state courts to try state cases and that, if constitutional issues arise, the state court judges are fully competent to handle

them, since they are bound by the Federal Constitution under Article VI.

(2) The traditional doctrine that a court of equity should stay its hand when a movant has an adequate remedy at law. *Wallace* v. *Kern,* 520 F. 2d 400, 404 (2d Cir. 1975).

Indeed, if Scranton's position were correct, defendants in state prosecutions could seek to have their indictments dismissed in state court, and then, if the state court denied this relief, they could proceed to the federal courts to litigate their claim. This would deliberately bypass the state appellate processes.

Inevitably, this procedure would add another layer to the already heavily burdened state criminal justice system. More significantly, it would in no way serve to provide speedier trials to defendants, but would add yet another element of delay into the trial procedure. Scranton is hardly faced with irerparable injury. Rather, she comes to this Court on the eve of trial, seeking to avoid an opportunity to present and develop her alleged defense of denial of a speedy trial. Indeed, this strategy has already been partially successful. The federal courts have already temporarily stayed state court proceedings. There is simply no reason for the court to stay the state proceedings any further. The People have been ready to try this case for two years now. Scranton will have the right to raise her speedy trial defense at her trial and by direct appeal to the state appellate courts if she is convicted. The length of the delay, the prejudice, if any, to the defendant, and the reasons for the delay will all become much clearer after the trial itself. *See McDonald* v. *Faulkner,* 378 F.

Supp. 573 (E.D. Okla. 1974); *Jones* v. *Tubman*, 360 F. Supp. 1298 (S.D.N.Y. 1973). If she is correct and if the state courts deny her speedy trial claims on the merits, she will be able to petition the federal courts for relief.

The situation might be different where a petitioner claims that a pending trial would place him twice in jeopardy.* There would then (assuming that the claim was valid and that there was no other state remedy available other than going to trial) be a basis for the district court to interfere with the state proceeding. *See United States ex rel. Russo* v. *Superior Court of New Jersey*, 483 F.2d 7 (3d Cir. 1973). This is so because the right not to be placed twice in jeopardy would be violated by the mere fact of being placed on trial. In other words, the trial itself would cause petitioner to suffer irreparable injury if the federal court denied equitable relief.

Since the essence of the guarantee is not to be placed twice on trial, there is no way a court can grant relief once the right is violated. Since there is no adequate relief at law, this presents a classic case for injunctive relief.** *Cf. Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971).

However, Scranton's claim is very different. Her claim can be litigated, as easily after trial as before. Indeed, as the court below correctly noted, the courts can better determine after trial whether a person has been prejudiced by a delay. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972).

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* Petitioner Scranton does not now make this allegation. There, petitioner had already exhausted her state remedies. *See Matter of Scranton* v. *Supreme Court*, 36 N.Y.2d 704 (1975).

** Indeed, it is for just these reasons that the New York courts allow a double jeopardy claim to be appealed before trial through a CPLR Article 78 proceeding for a writ of prohibition.

And if the state appellate courts or the federal courts subsequently determine that Scranton had been denied a speedy trial, her rights can be fully vindicated by vacating her conviction.

The right to a speedy trial is important because a defendant should not be made to suffer the anxiety and other disabilities of serious accusations that are let too long without resolution. Also lengthy delays before trial may limit the likelihood of having a fair determination of guilt or innocence. Granting Mrs. Scranton's relief after trial, if she deserves such relief, will not undercut either of these purposes. If Mrs. Scranton has suffered undue anxiety because of unresolved charges against her, resolving these chargese will not add to that anxiety. And if the determination of guilt or innocence has been destroyed by the delay, vacating her conviction subsequently will be a fully adequate remedy.

## POINT II

**Petitioner, who has been released on her own recognizance before trial, is not in custody: she faces neither severe nor immediate restraints.**

Agnes Scranton is now, and has been on bail virtually since the inception of her case. She has been paroled on her own recognizance at all times during her application for habeas corpus relief.

The essence of habeas corpus is an attack by a person in custody upon the legality of that custody. The relevant habeas corpus statutes require that the petitioner be "in

custody", 28 U.S.C. §§2241 (c) (3), 2254 (a). Relying on *Hensley* v. *Municipal Court,* 411 U.S. 345 (1973) and *Jones* v. *Cunningham,* 371 U.S. 236 (1963), the court below held that Scranton met the custody requirements of the habeas corpus statutes. Neither of these cases support the conclusion that petitioner is in custody. Indeed, both cases virtually compel the opposite conclusion.

In *Jones,* the Court noted:

> [Jones] cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life. Petitioner must not only faithfully obey these restrictions and conditions but he must fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed on him in violation of the United States Constitution. 371 U.S. at 242.

The Court held that Jones was "in custody" since the conditions and restrictions of his parole "significantly restrain [Jones'] liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the Great Writ". *Id.* at 243.

Later, in *Hensley* v. *Municipal Court,* 411 U.S. 345 (1973), the Supreme Court held that a defendant, who was convicted and released on his own recognizance pending his habeas corpus action, was in custody. *Id.* at 349-353. In *Hensley,* the petitioner had exhausted all his state rem-

edies prior to filing his petition for habeas corpus. Hensley's incarceration was not speculative and it was imminent. There was no chance that events would make the controversy academic. The state authorities had the power (and the will) to seize Hensley at the expiration of the stay. These factors led to the holding that Hensley was in custody.

> * * * Petitioner remains at large only by the grace of a stay entered first by the state trial court and then extended by two Justices of this Court. The State has emphatically indicated its determination to put him behind bars, and the State has taken every possible step to secure that result * * * This is not a case where the unfolding of events may render the entire controversy academic. The petitioner has been forced to fend off the state authorities by means of a stay, and those authorities retain the determination and the power to seize him as soon as the obstacle of the stay is removed. The need to keep the stay in force is itself an unusual and substantial impairment of his liberty. *Hensley, supra,* pp. 352-353.

Agnes Scranton's case is quite different. She has not been tried. She does not claim that she will be incarcerated before trial. Indeed, her trial may result in an acquittal. Her incarceration, then, is speculative and may be rendered academic by pending or subsequent state proceedings. Indeed, her only obligation, or "restraint," is to appear in court for proceedings in her case.* Clearly Scranton has as few restraints as any defendant in any criminal case. If she is in "custody," then all defendants

* During the pendency of the stay, Scranton has even been excused from appearing in court when her case is placed on the calendar.

in criminal cases are in custody. This result could hardly have been contemplated by *Hensley* when the Court noted that "the custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." *Id.* at 351.

In the cases cited by the court below the petitioners were either threatened with restraints more severe than Scranton's or they faced irreparable damage. In *United States ex rel. Russo* v. *Superior Court,* 483 F.2d 7 (3d Cir. 1973), *cert. denied,* 414 U.S. 1023 (1973), the petitioner who had been released on his recognizance had exhausted his remedies on his double jeopardy claim. Habeas corpus was his only remedy to prevent the state from twice placing him on trial, an "irreparable injury." *Id.* at 12. For, as we noted in Point I *supra,* there is no state or federal court that can grant relief to a person who has been twice placed in jeopardy, since it is that very right not to be twice placed in jeopardy which is the basis of the constitutional guarantee. Thus, although the restraints on Russo were not severe according to the Hensley holding, it was necessary for the federal court to be able to fashion some relief to prevent irreparable injury to Russo. Conceivably, the Court, in *Russo,* could have considered his request to be for injunctive relief under 42 U.S.C. §1983. This would have avoided the strained and erroneous holding that Russo was in custody. In *Anglin* v. *Johnston,* 504 F. 2d 1165 (7th Cir. 1974), *cert. denied* 95 S. Ct. 1353 (1975), the petitioner was jailed for civil contempt, clearly a custodial restraint, although the court states in *dicta* that a defendant released in his own recognizance before trial is in custody for habeas corpus purposes.

In *United States ex rel. Bailey* v. *United States Commanding Officer,* 496 F.2d 324 (1st Cir. 1974), the petitioner, who had filed a habeas corpus petition, subsequently "absented" himself without permission from military custody. Noting that petitioner was "in custody" at the time he filed his petition, the court, citing *Carafas* v. *La Vallee,* 391 U.S. 234 (1968), held that he continued to be in custody for purposes of habeas corpus jurisdiction. Thus, in all these cases, the petitioners were faced with restraints far more severe than Scranton's or with irreparable injury.

The necessity for "severe restraints" in determining the issue of custody was underscored recently in *Edmunds* v. *Fon Bae Chang,* 509 F.2d 39 (9th Cir. 1975). There, the petitioner, an attorney, was cited for contempt and fined 25 dollars. Although Edmunds claimed that his incarceration was imminent due to his refusal to pay the fine, the court held that his incarceration was, at most, speculative, and, in any event, the restraints on Edmunds were neither severe nor immediate enough to justify the remedy of habeas corpus relief. *Id.* at 41. As speculative as the restraints on Edmunds were, those facing Scranton are more speculative and less imminent.

## Conclusion

***The judgment appealed from should be affirmed.***

Respectfully submitted,

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January, 1976

Service of TWO copies of the within BRIEF is hereby admitted this 26th day of JAN. 1976

Signed Theresa V. Shapiro
Secy to Mrs Piel

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